BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	WC Docket No. 03-251
	)	
Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Customers	)	

COMMENTS OF
RNK, INC. D/B/A RNK TELECOM

RNK, Inc. d/b/a RNK Telecom ("RNK") respectfully submits these comments in response to the Commission's request issued in the above referenced docket on March 28, 2005.

I. INTRODUCTION

RNK, a small, privately-held company, based in Dedham, Massachusetts, was initially founded in 1992 and has grown from its initial niche of providing prepaid long distance calling cards to an Integrated Communications Provider, marketing competitive local and interexchange telecommunications services, as well as Internet Services and IP-enabled services, (e.g., VoIP voice services over 3rd-Party broadband). RNK is a certified Competitive Local Exchange Carrier ("CLEC") in

the states of Massachusetts, Rhode Island, New York, Florida, New Jersey, New Hampshire, and Connecticut offering residential and business telecommunications services via resale and through its own facilities. In addition, RNK has interexchange ("IXC") and/or local exchange resale authority in Vermont and Maine, as well as international facilities-based and resale §214 authority from the Federal Communications Commission ("FCC" or "Commission").

At the beginning of 2004, RNK launched its RNKVoIP™ suite of bundled local, long distance, and international calling to business and residential consumers, as well as extending wholesale opportunities for ISPs, cable television ("CATV") companies, and DSL providers. As its customer base has expanded beyond New England, RNK has targeted a nationwide consumer market and wholesaler network. RNK's products are designed to be broadband-provider-independent, as RNK does not, generally, sell xDSL or other broadband links. Rather, RNK allows consumers (and Internet Service Providers that wish to offer IP-enabled voice services to their customers) a competitive independent choice, and the ability to "one-stop-shop" for telecommunications, with a variety of pre- and post-paid local, long distance, and international calling products without being strapped to the legacy network.[1] As such, the "tying"[2] arrangements that are the subject of the

[1] The Commission is likely aware of RNK's unique position in the IP-Enabled marketplace through, among other things, its waiver petition requesting direct access to numbering resources for provision of IP-enabled services throughout the United States (*See* RNK Inc., *Petition for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Numbering Resources,* CC Docket 99-200, February 7, 2005, "RNK VoIP Numbering Waiver Petition")

[2] For the purposes of these comments, RNK defines "tying" as the practice of denying service to a customer, or discontinuing service to a customer, simply because that customer refuses to subscribe

Commission's *Order & Notice of Inquiry* directly and adversely impact RNK, other interconnected VoIP providers,[3] as well as CLECs.[4] Carriers such as RNK are doubly jeopardized as this practice not only impairs their ability to market VoIP services as a local exchange service replacement product, but also the ability to compete traditionally in a local market as a CLEC. As a recent new entrant into BellSouth's territory, should the current policy be upheld, RNK will likely become another victim of the unfolding anticompetitive tragedy precipitated by BellSouth's tying arrangements.[5]

II. THE COMMISSION SHOULD IGNORE ATTEMPTS TO CHARACTERIZE THE ISSUE AS ONE OF INTERNET REGULATION OR UNBUNDLING

The quintessential issue of this proceeding is competition in local telephone markets and not regulation of the internet. Despite BellSouth's assertions to the contrary, state commissions would not be regulating the Internet by preventing tying arrangements, but rather would be fostering competition in the local telephony market, which is consistent with federal law.

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to the a DSL provider's voice service (be it VoIP or traditional "POTS" service). RNK believes tying practices are anticompetitive and harmful regardless of the provider.

[3] See 47 CFR §9.3 for the Commission's definition of "interconnected VoIP services." To the extent that RNK refers to "VoIP providers" or "VoIP services" herein, the "interconnected" (i.e., to the Public Switched Telephone Network) should be inferred unless the context suggests otherwise.

[4] *See BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, WC Docket No. 03-251 ("BellSouth Petition").

[5] RNK recently signed an interconnection agreement with BellSouth in Florida April 28, 2005 and hopes to begin serving local customers within the next few months.

Further, the matter before the Commission presently is not an 'unbundling" issue as the term is used in relation to section 251 of the Telecommunications Act.[6] The Commission has already decided that section 251 unbundling requirements do not apply to DSL, and that decision has no bearing on the Commission's ultimate determination regarding BellSouth's effort to forestall competition.[7] RNK cannot emphasize enough that tying practices are not "unbundling" as they are defined in the Act and under Commission precedent. Rather, this refers to how BellSouth locks its customers into 'bundled" DSL and local exchange service. The base issue here is a discriminatory practice in which BellSouth, or any dominant ILEC, uses its market power to withhold DSL from consumers desirous of a more reasonably priced or alternative form of phone service (such as VoIP or wireless), so that these consumers have essentially no choice (i.e., economics and effort to change service make it irrational to act otherwise) but to continue using BellSouth's local service (and soon, likely BellSouth's own VoIP service). While beneficial to BellSouth, this practice ultimately harms competitors and consumers.

III. BELLSOUTH'S ANTICOMPETITIVE TYING ARRANGEMENTS ARE A BARRIER TO CUSTOMER CHOICE AND TO COMPETITION

As stated above, BellSouth's tying arrangement is doubly harmful to competitors like RNK that are both CLECs and VoIP providers as it frustrates two market entry

[6] 47 USC §251(c)(3) refers to "unbundled access" to "network elements" of the legacy ILEC infrastructure to new competitors. It might be better, in this case, to refer to the "tying" of local exchange service and DSL as a "combination" or "package" of telecommunications services, but we will use "bundle" as a synonym, for the sake of convenience.

[7] *BellSouth Petition* at 20.

methods simultaneously by forcing consumers to make an "all or nothing choice." It cannot be disputed that it is BellSouth's stated practice and policy to refuse to provide its FastAccess service to end users who desire to receive voice service from a carrier other than BellSouth.[8] BellSouth is actively impairing consumer choice whenever it refuses to provide its DSL service without its local telephone product.[9] BellSouth's anticompetitive tying binds consumers to its local telephone service in an attempt to invigorate its local telephone monopoly. Consumers forced to choose between competitive choice and being barred from DSL access cause a rational and foreseeable reluctance on the part of consumers to switch and maximize saving opportunities that inevitably occur in a truly competitive environment. This anticompetitive and discriminatory practice prevents consumers from taking service from the carrier they prefer or from leaving a carrier whom they might find to have substandard service for fear of loosing their DSL service. In effect, BellSouth has a hostage market. Several state commissions have addressed BellSouth's tying practice and have found it to be an impediment to competition[10] and deserves special attention by the Commission.

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[8] Florida Order, Agenda Conference transcript, Item No. 26, April 23, 2002 at 27. *See also* Motion to Dismiss of BellSouth FL Docket 020507-TP.

[9] BellSouth Telecommunications, Inc. Tariff FCC No. 1, §28.2.1(A), leaves no room for doubt: "[t]he designated end-user premises location [for BellSouth ADSL Service] must be served by an existing, in-service, Telephone Company provided exchange line facility."

[10] See *Petition of Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Final Order on Arbitration, Docket No. 010098-TP (June 5, 2002) ("Florida Order"), *Petition of Cinergy Communications Co. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. 252,* Case No. 2001-00432, Order (Ky. Pub. Ser. Comm'n July 12, 2002) ("Kentucky Order") (finding that BellSouth's tying practice has a "chilling effect on telecommunications competition in Kentucky"), *BellSouth's*

A. STATE COMMISSIONS REVIEWING BELLSOUTH'S TYING PRACTICE HAVE FOUND IT TO BE AN IMPEDIMENT TO COMPETITION AND CUSTOMER CHOICE.

Several state commissions have addressed the issue of whether or not BellSouth's tying practice is anticompetitive and determined that BellSouth should not require a DSL customer to purchase voice products. The Commission should act similarly to foster facilities-based competition in local voice markets and protect customers from predatory leveraging of market power. Even though the FCC preempted those Commissions, the logic they used, when in the instant federal context instead of a state context, is right on the mark.

The Georgia Public Service Commission ("Georgia Commission") addressed BellSouth's tying voice and data service in an arbitration proceeding and found the practice to be harmful to consumers and competition. The Georgia Commission determined that the purpose of BellSouth's tying policy "can only be so that BellSouth can charge more for the services together than it could apart. The evidence indicates that it could not maintain the same number of voice customers at the price it charges for the service if the service was not tied to its DSL service."[11]

Provision of ADSL Service to End-Users over CLEC loops, Docket No. R-26173, Order (La. Pub. Serv. Comm'n Jan. 24, 2003) ("Louisiana Order") (*In Re: BellSouth's provisions of ADSL Service to end-users over CLEC loops pursuant to the Commission's directive in Order U-22252-E*, Order R-26173 at 6 (January 24, 2003) (Determining that BellSouth's policies were inconsistent with the promotion of competition.) ("Georgia Order").

[11] Georgia Order at 15.

BellSouth admitted to the Georgia Commission that to many customers it services with its DSL product, BellSouth is virtually the only option.[12] Weighing the evidence before it, the Georgia Commission asserted that the record "included substantial evidence on the impact of BellSouth's policy on local voice competition in Georgia."[13] The Georgia Commission summarized its findings regarding BellSouth's unstated purpose behind tying:

> In sum, BellSouth uses the tying arrangement to insulate its voice service from competition by impairing the customer's ability to choose its provider of local service. It would inhibit local voice competition for BellSouth to gain advantage over its current competitors in the local voice competition market because of the history of regulation in the industry. [14]

Finally, the Georgia Commission ordered BellSouth to discontinue its policy of requiring consumers to receive voice service from BellSouth as a condition to receive BellSouth's DSL service.[15]

Florida also determined that BellSouth's tying practice was an impermissible detriment to competition.[16] In the Florida Order, the Florida Public Service Commission ("Florida Commission") mused that BellSouth's tying practice "raised valid concerns regarding possible barriers to competition in the local

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[12] October 21, 2003. GA PSC Order at 10. ("a substantial number of Georgia customers have access to BellSouth DSL but no cable broadband.").

[13] Georgia Commission Comments, Docket No. 03-251 at 3.

[14] Georgia Order at 18.

[15] Id. at 20.

[16] Petition of Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996, Final Order on Arbitration, Docket No. 010098-TP (June 5, 2002) ("Florida Order").

telecommunications voice market that could result from BellSouth's practice of disconnecting customers' FastAccess Internet Service when they switch to FDN [Florida Digital Network, Inc., a Florida CLEC] voice service."[17] Consequentially, after reviewing the evidence on record, the Florida Commission determined it was incumbent upon them to require BellSouth to continue to provide DSL service to CLEC customers. In so doing, the Florida Commission stated: "Thus, in the interest of promoting competition in accordance with state and federal law, BellSouth shall continue to provide FastAccess even when BellSouth is no longer the voice provider because the underlying purpose of such a requirement is to encourage competition in the local exchange telecommunications market, which is consistent with Section 251 of the Act and with Chapter 364, Florida Statutes."[18] The Florida Commission also ordered BellSouth to cease this practice.

Here, in addition to Bell South's misleading use of the Internet and unbundling to shield its true purposes from the Commission, RNK urges the Commission to also ignore any suggestions by BellSouth that the availability of resale products is enough to counterbalance its tying practice as disingenuous and false. BellSouth countered CLEC and state commission concerns raised by its tying practice by contending that the CLEC could still compete with BellSouth by reselling its local telephone product.[19] Several commentators have already provided this Commission

[17] Id. at 8.
[18] Id at 10.

[19] It should be noted, however, that the ability of a CLEC to resell BellSouth's retail local telephone product, other arguments regarding viability aside, would still leave Interconnected VoIP providers without a competitive alterative.

with ample evidence of the lack of viability of a resale model.[20] Further, resale in this context is not a matter of simple margin, but a different competitive service entirely, and further, does not increase the Commission's goal of vibrant facilities based competition or innovation, especially important in areas where BellSouth has a virtual DSL monopoly. In fact, were the Commission to accept BellSouth's competitive slight-of-hand, facilities based competitors in those areas where BellSouth maintains a strangle hold on DSL deployment may be dissuaded to compete as technologies become more convergent and consumers become more dependent on their Internet access.

B. BELLSOUTH'S TYING PRACTICE NOT ONLY STIFLES CLEC COMPETITION BUT ALSO ENTRY OF INTERCONNECTED VOIP PROVIDERS

Tying practices not only harm CLECs but also adversely impact competitive interconnected VoIP providers that depend on third-party connectivity to provide service. By cutting off interconnected VoIP providers from the local telephone market, BellSouth seeks to deprive the infant VoIP providers of nourishment and leave them to parish. BellSouth has offered no alternative for VoIP providers, not even resale scraps, and has effectively cut off interconnected VoIP providers from its locked-in customer base.

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[20] See *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commission May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, Exhibit A, Interrogatory Responses of MCI at 6. WC Docket No. 03-251 (February 20, 2004). ("[R]esale does not prove out economically as a strategy for selling voice services to consumers on a mass market basis, and no provider has ever succeeded in using resale to serve that market.").

Many consumers have flocked to services of interconnected VoIP providers, like RNK, as a cost-effective alternative to traditional local exchange service. Many interconnected VoIP providers, and most of those provided by those other than cable companies and dominant ILECs and the customers they serve depend on connectivity provided by third party broadband providers. By depriving consumers of the ability to obtain DSL service without voice services, BellSouth is completely stripping Interconnected VoIP providers of any ability to enter into markets where tying is imposed. By way of example, RNK's unlimited residential product generally retails for $24.95. RNK's product includes international calling to select countries, unlimited calling within the United States and all the additional features that would accompany a traditional voice service (e.g., call waiting, caller ID, 911/E911 and call forwarding). To obtain RNK's local and long-distance replacement service, like virtually all VoIP providers at this time, all a customer would need is a broadband connection such as BellSouth's DSL. In this case, the customer would only be paying for RNK's service and the broadband connection, or approximately $74.90 for RNK's service and approximately $49.95 for BellSouth's service depending on the area), a reasonable price considering some unlimited traditional voice service plans are slightly higher then the combined DSL VoIP services. However, requiring the customer to purchase simultaneously BellSouth's voice service with DSL, and a VoIP provider's service results in a situation that caused interconnected VoIP providers to be priced out of the market, and leaves the customer with one choice for voice service: BellSouth. This is the very result the

framers of the Act were attempting to end. Considering the Commission has just recently acted to bring stability and protection to VoIP customers by requiring 911/E911 availability[21] it would be sadly ironic for the Commission to cripple Interconnected VoIP services by denying them a large pool of possible customers and allowing BellSouth to continue to subsidize its legacy monopoly[22].

This Commission should heed carefully the warnings of the various state commissions that have addressed BellSouth's tying practice and determined it to be anticompetitive and harmful to consumers. Although the Commission chose not to allow state commissions to regulate DSL, it should listen to the reasons the state commissions felt it was so important to do so. With the Commission preempting the field on DSL, it steps into the shoes of those Commissions and is the only place consumers will be able to find equity on this issue. The Commission simply must act to prevent discriminatory tying practices that solely benefit BellSouth and other ILECs, and harm consumers and competition, at least in the short term as VoIP

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[21] *See,* generally, *In the Matters of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, ("VoIP E911 FR&O") WC Docket Nos. 04-36 and 05-196, released June 3, 2005.*See also* Remarks of Commissioner Kathleen Q. Abernathy, *Overview of the Road to Convergence: New Realities Collide with Old Rules* (as prepared for delivery) at *The Journey to Convergence: Challenges and Opportunities*, Catholic University, Columbus School of Law. January 22, 2004 (located at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243135A1.pdf) Commissioner Abernathy stated that VoIP "is increasingly creating the robust, facilities-based voice competition that the framers of the 1996 Act envisioned."

[22] VoIP E911 FR&O at para 31. The Commission refers to its obligation under section 706 of the Act to encourage the deployment of advanced telecommunications (e.g. broadband facilities) capability to Americans by promoting "competition in the local telecommunications market." In the Order, the Commission expresses its belief that in requiring E911 services in conjunction with interconnected VoIP services, consumer demand for VoIP may increase, thereby increasing demand for broadband connections. In denying consumers access to DSL, BellSouth ironically frustrates two goals of the Commission: 1) promoting local competition; and 2) encouraging the deployment of broadband services.

becomes an established service. If the Commission fails to act an oligopoly, decreased service, increased prices, and a lack of true competition will result.

C. BELLSOUTH'S TYING PRACTICE STRIPS CONSUMERS OF CHOICE IN VOICE SERVICES

BellSouth's tying of broadband and voice services creates an environment that deprives consumers of choice and forces them to take an "all or nothing" approach to voice and data services. As discussed above, for many consumers in BellSouth territory there is only one provider of broadband services: BellSouth. Increasingly, consumers throughout America are finding it necessary to have high-speed connections to the Internet for work, school or simply leisure activities. This increasing reliance on broadband access when coupled with tying practices such as those imposed by Bellsouth create an environment where the customer is a prisoner to the broadband provider.

BellSouth is attempting to leverage its DSL service in an effort to lock in customers to its voice product and continue its virtual monopoly in its service area. Under normal circumstances, a regulated wireline voice service provider would have a hard time attempting to lock its residential and/or small business customers into a service term commitment. This is because, in a pro-competitive environment, the Commission and local state commissions have made certain that consumers have the right to decide which provider they wish to use for telephone service. Impediments to this choice, such as oppressive disconnect charges, termination charges and fees imposed for switching carriers receive close scrutiny-commissions are reluctant to permit such fees without good reason.

BellSouth has cleverly devised a 'backdoor' approach to imposing disconnection fees on its voice customers without having to seek approval from consumer-minded state commissions by linking voice and data products into a mandatory package. If the consumer wants data service, they must have voice service, no exceptions. Once the consumer, who may not have any other choice in data provider, signs up with BellSouth for broadband, they are inextricably linked to the termination fees imposed on the data service, irrespective of whether it is the DSL service or the voice service they keep. In the absence of tying, the consumer would normally be able to switch to a new telephone provider, be it for price differences, poor service or personal preference. However, under BellSouth's tying scheme, the customer must face the consequences of losing its DSL broadband service and absorb termination fees that otherwise would not be imposed upon a local voice service customer.

Not only must the customer fear the imposition of termination fees, but also the loss of incidental associated features of BellSouth's DSL service, such as their email address. BellSouth DSL customers are provided, among other features, with an email address and web hosting services that may be used for personal or educational purposes. Consequently, when a customer chooses to move to a competitive local exchange carrier or VoIP provider, they will be deprived of not only broadband access, but also these additional features. Changing and email address and obtaining a new web host are just as inconvenient today as changing a telephone number or home address. This will certainly leave some customers wondering why they would ever change voice service providers when faced with all

the multiplying horrors imposed upon them by BellSouth for exercising competitive choice.[23] The Commission must act to deny BellSouth a vehicle for locking in its local voice customers and require BellSouth to offer its DSL service without tying it to voice products.

It is not, however, the mere existence of the DSL-local exchange bundle that the Commission should find repugnant. Rather, the issue is that all or some (in this case, stand-alone DSL) components of the bundle are not available individually, and that BellSouth is using its dominant status in the residential and small-business local exchange market to simultaneously increase the market share of one component (DSL), while protecting its near-monopoly of the other (local exchange service) component.

IV. The Commission has Authority and the Responsibility to Impose Remedies that Could Effectively Deal with Anti-Competitive Behavior.

Title II of the Act[24] empowers this commission with ample authority and remedies to prevent anticompetitive practices and the Commission should use these powers to cease BellSouth's tying practice.[25] Further, the Commission has

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[23] See Reply Comments of AT&T Corp. and The CompTel/ASCENT Alliance, Declaration of Janet Ahlfeld, 03-251 at para 1.

[24] 47 USC §201 *et seq.*

[25] It should be noted that under classic antitrust law BellSouth's tying would be considered an unlawful practice. Under antitrust law, an unlawful tying arrangement results in the 'abdication of a buyer's independent judgment' and deprive the 'tied" product from competition in the market. Times-picayune Pub. Co. v. United States, 345 U.S. 594, 604 (1953). However, the quintessential factor in converting an otherwise legal tying arrangement into an unlawful one 'lies in the seller's

alternative remedies, such as imposing merger conditions on incumbent LECs, as it has in the past to accomplish pro-competitive goals, certainly in the short-term, and prevent discriminatory practices.

A. The Commission Must Prevent Tying Practices that Bind Voice and Broadband Services as a Violation of Section 202 of the Act and Commission Precedent

The Preamble to the Act calls it "[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[26] Under the Act, the Commission has broad authority in the public interest to regulate telecommunications and ensure healthy competition. This more recent mandate, along with more traditional common-carrier statutory provisions, such as Section 202,[27] give the Commission both the means, and responsibility, to stop legacy monopolies from extending their market power to new technologies.[28]

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exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.' *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). Courts apply four elements in order to establish and unlawful tying arrangement: (1) that there are two separate products, a tying product and tied product, (2) that the products are tied together in fact and the buyer is forced to buy the tied product, (3) the seller possess sufficient economic power in the tying product market to force the buyer to accept the tied product, and (4) the involvement of interstate commerce. *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d. 1407 1414 (11th Cir. 1987). It is apparent from the discussion above that BellSouth's "tying" arrangement arguably is impermissible under antitrust law.

[26] Pub. Law 104-104 (1996).

[27] 47 U.S.C. §202.

[28] In fact, this responsibility was recognized long before the 1996 Act. *See National Ass'n. of Regulatory Utility Commissioners v. FCC*, 173 U.S. App. D.C. 413, 421, 525 F.2d 630, 638, *cert. denied*, 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976), ("The Commission retains a duty of

Section 202(a) specifically, prohibits common carriers, including BellSouth, from subjecting consumers to conditions that are unlawful or patently discriminatory in connection to the provision of services.[29] Section 202 of the Act declares any unjust or unreasonable discrimination or preference "in charges, practices, classifications, regulations, facilities, or services" illegal:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[30]

The Commission has previously determined that incumbent LECs' DSL service "must continue to comply with their basic common carrier obligations with respect to these services …" including offering these services "on just, reasonable, and nondiscriminatory terms …."[31] However, simply because a product is "bundled" or "tied" does not necessarily rise to the level of a section 202 violation. In fact, the Commission has endorsed such practices under certain circumstances.

In the *Bundling Order*, the Commission allowed bundling of products and services under certain circumstances. The Commission determined that incumbent

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continual supervision of the development of the [nation's telecommunications] system as a whole, and this includes being on the lookout for possible anticompetitive effects.").

[29] 47 USC §202(a).

[30] *Id.*

[31] In *the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 at para 21 (November 9, 1999)

local exchange carriers should be allowed to offer "packages of service that include CPE, enhanced services, and local exchange service at one price."[32] However, the Commission acknowledged "the local exchange market is not substantially competitive" and therefore, incumbent LECs have the ability to exert their market power over competitors.[33] Recognizing this risk, the Commission balanced the risks of anticompetitive behavior with the public interest benefits associated with bundling. In particular, the Commission noted that ILECs would still offer local exchange service separately on an unbundled tariffed basis if they bundle such service with CPE and the Commission required incumbent LECs to offer exchange access service and other "dominant" services separately on a nondiscriminatory basis.[34] Notably, the Commission emphasized the fact "that the benefits associated with allowing carriers to bundle products and services at one price do not exist where the provider maintains sufficient market power to require that a customer purchase multiple goods or services in order to obtain one of the components in the package."[35] Indeed, the Commission harkened back to *Computer II*[36] in noting that one of the prime reasons for the Commission's CPE bundling restrictions was to bar

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[32] Id.

[33] Id.

[34] Id.

[35] Id at 18.

[36] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended 1998 Biennial Regulatory Review-Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets*, CC Docket Nos. 98-183 and 96-61, Report and Order, FCC 01-98 (March 30, 2001). ("Bundling Order").

carriers from making customers purchase carrier-supplied CPE equipment that they did not want in order to obtain transmission service.[37]

In this case, no such safeguards as described by the Commission in the *Bundling Order* exist, and BellSouth is requiring its DSL customers to accept unwanted ancillary services in a way that the *Computer II* Commission found to be suspect. By tying DSL to the purchase of local exchange service, BellSouth not only willfully puts consumers at an undue disadvantage, by hampering their ability to make a competitive choice based on price or quality of the services themselves; but it also gives ***itself*** an impermissible "preference or advantage" over other voice providers.

There is no rational reason why a customer of BellSouth's DSL service should not be able to obtain competitive voice services, since DSL and traditional voice services are two distinct and separate product lines. If BellSouth were to offer its DSL service at "just and reasonable" prices apart from its monopoly voice products, there would be no issue. A customer who had BellSouth's DSL and traditional voice service would be free to transfer his or her service to a CLEC, a VoIP provider, or a CMRS provider. BellSouth would still retain the user as a subscriber of DSL service. The consumer would retain choice. Everyone, in this scenario—including the "new" voice provider—benefits.

[37] Id.

The current state of affairs, although hurtful to CMRS and traditional voice CLECs, is even more insidious to interconnected VoIP providers, such as RNK and Vonage. In a typical scenario, the consumer (assuming they are a customer of BellSouth for both DSL and voice) wants to migrate to an interconnected VoIP provider for his or her primary voice service (as is becoming more commonplace). When a customer places an order with RNK (or a similar provider), they would likely want to port their number and "get rid" of their simultaneously POTS service. Of course, in order for the VoIP service to function, the customer would need to retain their DSL service. When a customer ports a telephone number, it functions as a "disconnect" order for the associated local exchange service. In this case, it would also, be a "disconnect" order for the DSL. So, the customer would be left with no DSL and no voice service—aside from VoIP service that they could not use. This could be easily avoided if BellSouth would eliminate the requirement of having traditional voice service as a condition of having BellSouth DSL.

However, BellSouth has consciously refused to do this in order to leverage its market share of its monopoly products into a greater share of the burgeoning market for broadband services. BellSouth's practice of tying DSL and legacy voice products is an unreasonable and discriminatory effort to perpetuate its voice monopoly in violation of section 202 of the Act.

B. The Commission Should Require, As a Condition to Any Merger, ILECs to Offer DSL Separate from Its Local Voice Products.

Apart from section 202 of the Act, the Commission may have alternative remedies at its disposal, not necessarily for Bell South at this time, but for Verizon and SBC, who also control monopoly dominance over DSL, the vast majority of the local market, and do or can bundle their DSL and voice or VoIP services in a manner to deprive choice and stifle innovation in a manner similar to that of Bell South in the instant docket. Accordingly, the Commission should consider the possibility of requiring, as a condition of any future mergers involving ILECs, the offering of DSL separate from any voice products.

In the *Bell Atlantic Merger Order*, the Commission identified significant concerns over the harm to competition that would be caused by the merger of Bell Atlantic/NYNEX with GTE.[38] In order to address these concerns, the Commission agreed to certain "commitments" sufficient to "outweigh the harm to the public interest" created by the merger.[39] The Commission concluded that absent these conditions, the proposed merger would pose a significant risk of harm that would outweigh the modest benefits that the transaction may achieve.[40] As such, the Commission and Bell Atlantic agreed upon several voluntary conditions set forth by

[38] *Memorandum Opinion and Order, Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd. 19985 at para 246 (1997) ("Bell Atlantic Merger Order"). *See also Application of Ameritech Corporation and SBC Communications Inc. for Transfer of Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd. 14712 (1999).

[39] Id. at 178.

[40] Id. at 245.

the Commission in Part VIII of the *Bell Atlantic Merger Order*.[41] The Commission imposed several merger conditions upon Bell Atlantic in order to "accomplish five primary public interest goals: (a) promoting equitable and efficient advanced services deployment; (b) ensuring open local markets; (c) fostering out-of-territory competition; (d) improving residential phone service; and (e) ensuring compliance with and enforcement of the conditions."[42] Among these conditions were requirements that Bell Atlantic offer telecommunications carriers operating within its service area any interconnection arrangement negotiated between Bell Atlantic and another carrier,[43] and that Bell Atlantic establish an advanced services separate affiliate.[44] With these safeguards in place, the Commission approved the Merger of Bell Atlantic and GTE.

The Commission should be mindful of this precedent as it faces the mergers of such large telecommunications entities as MCI and Verizon and AT&T and SBC. While RNK is certain this Commission has ample authority to prevent unlawfully tying arrangements such as BellSouth's, RNK also believes the Commission should take the opportunities presented by these key mergers to enhance competitive alternatives to consumers by requiring these merging entities. Accordingly, if the Commission should determine that BellSouth's tying practice is lawful, it should also require it to offer reasonably priced stand-alone DSL service to customers.

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[41] Id. at 248.

[42] Id. at 251.

[43] Bell Atlantic Merger Order at 300.

[44] Id. at 260.

RNK believes that this condition would be necessary to any merger to offset the loss of the two largest CLECs as they merge with RBOCs. A condition similar to the one RNK proposes would create a transition period, of at least three years, during which CLECs and Interconnected VoIP providers would be able to make competitive inroads, develop an imbedded base, and compete with vertically-integrated monopolies, or something fairly close, on an equal footing. If evening the playing field is important to the Commission, herein lies a golden opportunity.

V. Conclusion

For the forgoing reasons, The Commission should act decisively and expeditiously to prevent BellSouth from discriminating against consumers and its competitors by tying its DSL service to legacy voice products.

Respectfully submitted, by its Attorneys

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